

Respondent contends the ALJ erred in determining the nature and extent of claimant's disability and concluding he is entitled to future medical treatment. Respondent

also maintains it is entitled to a credit for overpaid temporary total disability (TTD) benefits paid from February 3, 2012, through July 30, 2012.

Claimant argues the Award should be affirmed.

The issues raised on review are:

1. Is respondent entitled to a credit for overpaid TTD from February 3, 2012, through July 30, 2012?
2. Is claimant entitled to future medical treatment?
3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant was age 68 when he testified at the April 4, 2013, regular hearing. He started working for respondent on August 5, 2011. Claimant worked in respondent's sanitation department. His job duties included cleaning machines and floors.

Claimant is a high school graduate, has a college degree in history and political science, and received training from H&R Block as a tax preparer. He received a diploma from a truck driving academy and has a current commercial driver's license (CDL). Claimant's work history consisted primarily of driving trucks and sales.

Before claimant commenced employment for respondent, he received social security retirement benefits for approximately two years. Claimant testified he retired from work as an over-the-road truck driver¹ and went to work for respondent because he needed the money.

Claimant described the August 14, 2011 accident:

A. I was assigned to the -- what they call the dish room. That's because I didn't have the proper boots that the company assigns you, nothing would fit or had any

¹ R.H. Trans. at 12. The reports of Mr. Lindhal and Mr. Benjamin, the vocational witnesses, show claimant did not retire but continued to work before and after the commencement of his social security retirement benefits. Lindahl Depo., Ex. 2 at 4-5; Benjamin Depo., Ex. 2 at 2. The Board notes the retirement benefit offset in K.S.A. 2011 Supp. 44-501(f) was not raised as an issue before the ALJ, nor is it argued in respondent's brief or mentioned in respondent's application for Board review.

tread left on it, so they assigned me to the dish room to wash dishes, about everything and anything in the place, and during the morning I slipped and fell.

Q. And did you land on -- was this a concrete floor?

A. It's a combination of tile and concrete, yes.

Q. And you slipped because the floor was wet?

A. Wet, there was candy, hot water, all kinds of debris on the floor.²

Claimant landed on his knees and elbows and experienced immediate pain in his legs, back, shoulders, arms and head. Claimant testified he was not able to feel his legs and saw "stars." The parties stipulated the claim is compensable. After the accidental injury, claimant received conservative treatment.

Claimant testified he was unable to perform his job at respondent, nor could he do his previous work for Interstate Distribution Company (over-the-road truck driver) and Wal-Mart (worker in the automotive department).³ At the time of the regular hearing, claimant's personal physician was prescribing Oxycodone for pain.

Claimant was terminated by respondent in June or July 2012, and has engaged in no substantial gainful employment since his termination.

Dr. James Zarr, board certified in physical medicine and rehabilitation, evaluated claimant on October 14, 2011, at the request of respondent's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. The doctor diagnosed neck and low back pain.

Dr. Zarr evaluated claimant again on November 2, 2011. He allowed claimant to return to full-time, light-duty work with no lifting greater than 15 pounds; no repetitive bending, stooping, kneeling, squatting, and climbing; and no overtime work. Claimant returned for a follow-up appointment with Dr. Zarr on December 7, 2011. Claimant was referred to a pain management clinic, however, claimant did not receive pain management evaluation or treatment.⁴

² R.H. Trans. at 9-10.

³ *Id.* at 13-14.

⁴ Zarr Depo. at 15. Dr. Zarr anticipated claimant would receive epidural steroid injections, however, claimant's diabetic condition and transportation issues of an unknown nature resulted in no injections. Zarr Depo. at 14-15.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, evaluated claimant on November 8, 2011, at the request of claimant's attorney. The doctor reviewed medical records and radiographic studies. Dr. Murati found the September 14, 2011, MRI scan of claimant's lumbar spine revealed degenerative disk disease, annular tears at L4-5 and L5-S1, bulging disks at L3-4 and L5-S1 and spinal stenosis. Dr. Murati diagnosed myofascial pain syndrome of the shoulder girdles bilaterally extending into the cervical and thoracic paraspinals; low back and neck pain with signs of radiculopathy; and bilateral SI joint dysfunction.

On January 9, 2012, Dr. Zarr ordered a work hardening program that claimant completed. As of February 3, 2012, claimant was still having neck, mid back and low back pain. Dr. Zarr found claimant achieved maximum medical improvement (MMI) and released him on February 17, 2012. Dr. Zarr imposed no permanent restrictions. Dr. Zarr rated claimant's permanent functional impairment at 5% each to the cervicothoracic spine and the lumbar spine, totaling 10% to the whole body.

Dr. Zarr admitted that: 1) claimant's neck and low back pain were legitimate and real to the patient⁵ and, 2) if claimant returned to work and performed the tasks listed in Mr. Benjamin's task list, he would expect claimant's pain to either continue or worsen.⁶

Dr. Terrance Pratt performed a court-ordered independent medical evaluation on April 24, 2012, and reported his findings and opinions to the ALJ in a narrative report bearing that date. Dr. Pratt found claimant had palpable tenderness to the cervical, thoracic and lumbosacral regions. Dr. Pratt diagnosed low back pain with degenerative disk disease with possible disk protrusion, and cervicothoracic and thoracolumbar discomfort with degenerative disease. Dr. Pratt recommended a surgical consultation and, if surgery was not appropriate, then claimant would be at maximum medical improvement. Dr. Pratt was not deposed and he expressed no opinion regarding permanent impairment, permanent restrictions, task loss or claimant's capacity to engage in gainful employment.

On July 11, 2012, claimant was evaluated by Dr. Ebeling, a neurosurgeon, who did not recommend surgical treatment.

On September 25, 2012, claimant again saw Dr. Murati. The doctor reviewed additional medical records, took a history and performed another physical examination. Dr. Murati diagnosed myofascial pain syndrome of the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; low back and neck pain with signs of radiculopathy; and right SI joint dysfunction. Permanent restrictions were imposed of no lifting, pushing, or pulling greater than 10 pounds; no bending, stooping, crouching or

⁵ Zarr Depo. at 14.

⁶ Zarr Depo. at 21.

crawling; above shoulder work and climbing stairs should rarely be performed; and occasional sitting, standing or walking in an 8-hour work day.

Dr. Murati concluded claimant reached MMI on September 25, 2012. However, the doctor testified claimant will need chronic pain management. Surgical treatment may become necessary, but it is unlikely.

Based upon the *AMA Guides*,⁷ Dr. Murati placed claimant in: 1) Cervicothoracic DRE Category III for a 15% whole person impairment; 2) Thoracolumbar DRE Category II, for a 5% whole person impairment; and, 3) for claimant's low back, Lumbosacral DRE Category III for a 10% whole person impairment. Using the *AMA Guides*' Combined Values Chart, the ratings of Dr. Murati totaled 28% permanent whole person functional impairment.

Dr. Murati reviewed the list of the work tasks performed by claimant in the 5 years prior to the accidental injury prepared by vocational rehabilitation counselor Doug Lindahl, and concluded claimant could no longer perform 12 of the 16 tasks Mr. Lindahl identified for a 75% task loss.

Mr. Lindahl performed a vocational evaluation at the request of claimant's attorney. In addition to preparing a task list, Mr. Lindahl addressed claimant's ability to engage in gainful employment. Claimant was not working and therefore had a 100% wage loss. Based on Dr. Murati's permanent restrictions and considering claimant's age, education and training, Mr. Lindahl opined claimant cannot engage in work in the open labor market.

Steve Benjamin, a vocational rehabilitation consultant, performed a vocational analysis at the request of respondent's attorney. Mr. Benjamin identified 21 nonduplicated work tasks claimant performed in the 5-year period before his injury. Mr. Benjamin opined that, using Dr. Zarr's opinion that no permanent restrictions were required, claimant was capable of earning \$392.80 per week. If Dr. Murati's restrictions were used, claimant would not be able to reenter the open labor market and would not be able to earn a wage.

Respondent paid claimant TTD for 38.71 weeks, from August 22, 2011, to July 20, 2012, at the rate of \$266.68.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(c) provides:

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2011 Supp. 44-510c(a)(2) provides:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and incapable of engaging in any type of substantial and gainful employment. Expert evidence shall be required to prove permanent total disability.

A person is permanently and totally disabled when he or she is "essentially and realistically unemployable."⁸

Respondent is entitled to a credit for overpaid TTD from July 11, 2012, to July 20, 2012, a period of 1.14 weeks. Dr. Zarr released claimant at MMI on February 17, 2012. However, Dr. Zarr testified he recommended pain management evaluation which was never provided. Although claimant's diabetes rendered epidural steroid injections

⁸ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

contraindicated, pain management may consist of more than just injections. According to Dr. Zarr, no pain management evaluation was conducted. The court-appointed neutral physician, Dr. Pratt, evaluated claimant on April 24, 2012, and concluded claimant had not reached MMI until claimant underwent a surgical consultation and only if surgery was found not required would claimant be at MMI. The surgical consultation with Dr. Ebeling occurred on July 11, 2012. Hence, claimant reached MMI on July 11, 2012, and was not entitled to TTD beyond that date.

The issue of future medical treatment requires no extended discussion. As previously noted, Dr. Zarr, the only authorized treating physician to testify, recommended claimant be referred to a chronic pain management clinic for consideration of injections. Dr. Murati also recommended claimant be provided with pain management treatment. However, claimant did not receive epidural injections because of claimant's diabetic condition and because claimant evidently had a problem of some sort securing transportation. Claimant therefore received no treatment or evaluation from a pain management clinic.⁹ Claimant continued to receive pain medication prescribed by his personal care provider. The presumption that respondent's obligation to provide medical treatment was terminated when claimant reached MMI was overcome by medical evidence establishing it is more probably true than not true that claimant needs and will need additional medical treatment as a consequence of his accidental injury. Accordingly, claimant is entitled to future medical treatment as specifically detailed in the Award.

Regarding the nature and extent of claimant's disability, the ALJ found claimant was permanently and totally disabled. There is evidence supporting that conclusion and there is also evidence supporting a finding that claimant retains the ability to engage in substantial gainful employment.

Claimant is well educated. He graduated high school and has a college degree in history and political science, a diploma from a truck driving academy, and tax preparation training from H&R Block. Claimant has worked in various sales positions, some of which appear to be sedentary in nature, and he testified his CDL remains current. Arguably, claimant retains some transferable job skills.

According to the vocational experts, claimant had not performed a sales job since approximately the year 2000, and he has never performed a job in which his background in history and political science were put directly to use. His work experience in lighter duty jobs is relatively remote in time and his knowledge of tax preparation is likely of limited value due to the ever changing landscape of tax law and policy. Claimant's age, now 69, would likely be disadvantageous in retaining gainful employment. Claimant's efforts to secure employment since he was terminated by respondent have been unsuccessful.

⁹ Zarr Depo. at 15.

The Board is hard pressed to place significant weight on Dr. Zarr's opinion that claimant should observe no physical restrictions as a result of the accidental injury. Claimant's chronic pain, the medical treatment required to treat his injury and the objective findings on physical and MRI evaluation lead the Board to conclude that Dr. Murati's restrictions are more reasonable under the circumstances of this claim. Under Dr. Murati's restrictions, both vocational experts agree claimant has been rendered unable to work and earn wages in the open labor market.¹⁰

The Board finds claimant's permanent functional impairment is 16.5% to the whole body and concludes the ALJ correctly determined claimant is entitled to disability benefits based on a permanent total disability pursuant to K.S.A. 2011 Supp. 44-510c(a)(1)(2).¹¹

CONCLUSIONS OF LAW

The Board find that the ALJ's Award should be affirmed as modified:

1. Respondent is entitled to a credit for overpaid TTD from July 11, 2012, to July 20, 2012, a period of 1.14 weeks. The credit is applied in the calculations below, pursuant to K.S.A. 2011 Supp. 44-525(c).

2. Claimant is entitled to future medical compensation as specifically set forth in the Award.

3. Claimant's permanent functional impairment is 16.5% to the whole body, and claimant is awarded permanent disability compensation based on a permanent total disability pursuant to K.S.A. 2011 Supp. 44-510c and K.S.A. 2011 Supp. 44-510f, as detailed in the computations below.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ Rebecca A. Sanders dated June 28, 2013, is affirmed as modified.

¹⁰ Lindahl Depo. at 9-10; Benjamin Depo. at 11-12.

¹¹ The parties agreed at oral argument that if claimant is permanently totally disabled, then the total award should be \$155,000 not \$125,000 pursuant to K.S.A. 2011 Supp. 44-510f(a)(1).

¹² K.S.A. 2011 Supp. 44-555c(k).

Claimant is entitled to 37.57 weeks temporary total disability compensation at the rate of \$272.01 per week or \$10,219.42 followed by permanent total disability compensation at the rate of \$272.01 per week not to exceed \$155,000.

As of December 6, 2013, there is due and owing to the claimant 37.57 weeks of temporary total disability compensation at the rate of \$272.01 per week in the sum of \$10,219.42 plus 83.14 weeks of permanent total disability compensation at the rate of \$272.01 per week in the sum of \$22,614.91 for a total due and owing of \$32,834.33, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$122,165.67 shall be paid at \$272.01 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Rebecca Sanders, ALJ